



## California Sportfishing Protection Alliance

*"An Advocate for Fisheries, Habitat and Water Quality"*

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4 April 2009

Mr. Lonnie M. Wass, Supervising Engineer  
Ms. Jo Anne Kipps, Senior WRCE  
Ms. Jill Walsh, SEA  
Regional Water Quality Control Board  
Central Valley Region  
11020 Sun Center Drive, Suite 200  
Rancho Cordova, CA 95670-6144

VIA: Electronic Submission  
Hardcopy if Requested

RE: Administrative Civil Liability Complaint R5-2009-0505 For Assessment of Mandatory Minimum Penalties, California Dairies, Inc., Tipton Milk Processing Facility (WDID 5D541067001, Tulare County

Dear Mesdames Kipps, Walsh and Mr. Wass:

On 9 December 2008, the Central Valley Regional Water Quality Control Board offered California Dairies Inc. Tipton Milk Processing facility (Tipton Milk) an opportunity to settle Mandatory Minimum Penalty (MMP) liability for NPDES permit violations through issuance of Conditional Early Settlement Offer R5-2008-0629 (Offer) in the amount of eight hundred forty-six thousand dollars (\$846,000). The Offer included 282 violations identified as subject to MMPs. On 16 January 2009, California Sportfishing Protection Alliance (CSPA) submitted comments to the Central Valley Water Board documenting several hundred effluent violations that had been inappropriately "exempted" from MMPs contrary to the requirements of the California water Code (CWC) and requested a public hearing on the matter. In February 2009 the currently proposed Administrative Civil Liability Complaint (ACLC)(R5-2009-0505) was issued identifying 476 violations subject to MMPs raising the penalty to \$1,428,000. The cited violations added 191 violations of effluent flow limitations not initially identified in the Regional Board's initial offer for settlement for a total of 476 violations identified as subject to MMPs.

The California Integrated Water Quality System (CIWQS) is a computer system used by the State and Regional Water Quality Control Boards to track information about places of environmental interest manage permits and other orders, track inspections, and manage violations and enforcement activities. CIWQS also makes data available to the public through reports. As was detailed in CSPA's 16 January 2009 comment letter, the CIWQS public report showed that there were 499 Effluent Limitation violations that are listed as "exempted" and not reported or discussed in the original Settlement Offer:

- 218 exceedances of the electrical conductivity (EC) Effluent Limitation that were not counted as violations but were defined as not applicable "N/A due to revised method for

compliance determination”.

- 30 exceedances of the electrical conductivity (EC) Effluent Limitation that were not counted as violations but were exempted as “Only one violation per week subject to MMPs”.
- 22 exceedances of the electrical conductivity (EC) Effluent Limitation that were not counted as violations but were exempted as both “N/A due to revised method for compliance determination” and “Only one violation per week subject to MMPs”.
- 207 exceedances of the permitted Effluent Limitation for flow that were not counted as violations but were defined as “limitation for flow, not pollutant, therefore considered not subject to MMP”.

The Regional Board’s revised ACLC (R5-2009-0505) adds the previously “exempted” flow limit violations but continues to exempt approximately 240 EC Effluent Limitation violations.

State Water Resources Control Board Order WQ 2007-0010 (SWRCB/OCC FILE A-1796) in the Matter of the Petition of Escondido Creek Conservancy and San Diego CoastKeeper found, in part, the following:

- In 1999, the Legislature enacted two laws to establish mandatory minimum penalties for certain violations of NPDES permits. Each bill contained a legislative finding that then-current “enforcement efforts of the state board and the regional boards may not be achieving full compliance with waste discharge requirements in a timely manner.” The statute states that an MMP “shall be assessed” for each serious violation. The plain language of the statute removes discretion from the water boards regarding the minimum amount that they must assess when a serious violation has occurred. As a result, Water Code section 13385 now provides for administrative civil liability that *may* be assessed by discretionary action (subdivisions (c) – (g)), but identifies certain violations where any civil liability *must* recover minimum penalties of \$3,000 for each violation (subdivisions (h) – (l)).
- The State Water Board is fully aware of limited staff resources, but administrative settlements cannot diminish or avoid the imposition of MMPs for serious violations. If violations occur that are subject to MMPs and an administrative civil liability complaint is issued, any administrative action that results in a fine lower than the minimum statutory requirement must be accompanied by a determination either that the MMP was not correctly assessed or that the discharger proved an appropriate affirmative defense. (Emphasis added)

The Regional Board’s revised ACLC (R5-2009-0505) contains the following Findings and does not state such but continues to “exempt” approximately 240 EC Effluent Limitation violations:

- “12. The effluent EC limitation prescribed by WDRs Order 94-295, Effluent Limitation B.5, stated: “Mineralization, as measured by electrical conductivity

(EC), shall not exceed the average EC of the source water plus 500 umhos/cm, or a maximum of 1000 umhos/cm, whichever is less.” Effluent Limitation B.5 expresses the limitation in the implementation chapter of the first edition of the Water Quality Control Plan, Tulare Lake Basin (1975). This same limit, slightly modified, was included in the second edition of the Basin Plan, adopted in 1995.

13. MRP 94-295 required, in part, the following monitoring of Discharge Point 001: weekly monitoring for BOD, TSS, and EC; daily monitoring for settleable solids (SS) and pH; weekly monitoring for TCO; and monthly monitoring for chlorides and boron. The MRP also required monthly monitoring of source water EC.
14. WDRs Order R5-2008-0114 specifies the manner in which compliance with the mineralization requirement of the Basin Plan is to be determined. The effluent EC limitation of WDRs Order R5-2008-0114 (Effluent Limitation A.1.d) states: **Electrical Conductivity**. Effluent annual average EC shall not exceed the annual flow-weighted average EC of the source water plus 500 umhos/cm, or a total of 1,000 umhos/cm, whichever is more stringent. (For compliance determination, see Section VII.C) [presented below]. **Effluent Annual Average Electrical Conductivity**. Compliance with the limit will be determined monthly by comparing the annual rolling average of the weekly data submitted for effluent EC and the annual rolling average of the monthly flow-weighted data submitted for the source water EC.
15. Compliance with WDRs Order 94-295, Effluent Limitation B.5, which limits Electrical Conductivity, was not specifically defined in that Order and may be interpreted in different ways. Order R5-2008-0114 recognized this ambiguity and provided a definition for determining compliance with Effluent Limitation B.5 that is designed to implement the same provisions of the Basin Plan. Board staff has reviewed the Discharger’s self-monitoring reports covering the period from 1 January 2000 through 30 July 2008 (hereafter review period) using the more precise compliance evaluation procedures contained in WDRs Order R5-2008-0114 to determine compliance with the effluent EC limitation in WDRs Order 94-295. Such use of more detailed compliance procedures is a rational means of resolving compliance ambiguity in WDRs Order 94-295, Effluent Limitation B.5.”

The Effluent Limitation for EC from WDR Order No. 94-295 states that: “Mineralization, as measured by electrical conductivity (EC), shall not exceed the average EC of the source water plus 500  $\mu$ mhos/cm, or a maximum of 1000  $\mu$ mhos/cm, whichever is less.” The Effluent Limitation for EC in Order No. 94-295 is not a weekly or annual average but simply shall not be exceeded at any time. There is nothing ambiguous about the Effluent Limitation or the means of determining compliance.

Order No. 94-295 contains numerous Effluent and Receiving Water Limitations. Those limitations, which have an associated compliance time frame or allow for averaging are clearly identified as such. Specifically, BOD, total suspended solids, settleable solids, total coliform

organisms, boron and chloride are clearly labeled with their associated compliance period. The Effluent Limitations for pH and dissolved oxygen, like mineralization (EC), have no associated compliance period: compliance must be maintained continuously. The Receiving Water Limitations likewise have no associated compliance time frame and must be complied with continuously. For example, the Limitations require that the discharge shall not have a pH less than 6.0 or greater than 9.0; it is commonly accepted that an effluent or receiving water grab sample showing a pH of 5.9 violates the limitation. The Effluent and Receiving Water Limitations in Order No. 94-295 clearly establish that any deviation from an instantaneous maximum concentration is defined by a clearly labeled compliance period. There is nothing in Order No. 94-295 that allows averaging in determining compliance with the Effluent Limitation for EC.

WDR Order No. 94-295 was adopted in 1994. WDR Order No. R5-2008-0114 was adopted in 2008. The 2008 Order replaces the 1994 Order but does not amend it; Order No. 94-295 was rescinded by the adoption of Order No. R5-2008-0114 which contains the following language: “IT IS HEREBY ORDERED, that Orders No. 94-295 and No. 92-057 are rescinded upon the effective date of this Order except for enforcement purposes, and, in order to meet the provisions contained in Division 7 of the CWC (commencing with Section 13000) and regulations adopted thereunder, and the provisions of the federal Clean Water Act (CWA) and regulations and guidelines adopted thereunder, the Discharger shall comply with the requirements in this Order.” The Effluent Limitation and Compliance Determination procedure in Order No. R5-2008-0114 for EC constitutes a significant relaxation of the EC Effluent Limitation in Order No. 94-295. While the Antibacksliding regulations (40 CFR 122 (l) and 122.62 (a) (16) can be addressed in a permitting action, they cannot be retroactively applied to a previous permit. The “exemption” for “N/A due to revised method for compliance determination” is incorrect.

The monitoring frequency for EC in Order No. 94-295 is weekly, however there is no “weekly” association to the Effluent Limitation. Sampling frequency does not equate to a compliance time frame associated with an Effluent Limitation. For example; it is common practice to limit metals as a daily maximum and monthly average in NPDES permits; however sampling is typically conducted no more than monthly and in many cases quarterly. The quarterly sampling requirement does not alter the time frame associated with the Effluent Limitation. The Effluent Limitation for EC in Order No. 94-295 is not a weekly limitation and can be exceeded more than once during a week. The Discharger chose to sample more frequently than was required by the Monitoring and Reporting Program. Each sampling event subjects the Discharge to potential violation of the Effluent Limitation. The “exemption” for “Only one violation per week subject to MMPs” is incorrect. Order No. 94-295 requires that: “The Discharger shall comply with all the items of the "Standard Provisions and Reporting Requirements for Waste Discharge Requirements (NPDES)", dated 1 March 1991, which are part of this Order. This attachment and its individual paragraphs are referred to as "Standard Provision(s)".” Standard Provisions require that the results of any sampling conducted more frequently than required by the Monitoring and Reporting Program must be submitted to the Regional Board. The Regional Board and the Regional Board’s Executive Officer do not have discretionary authority to exempt Dischargers from mandatory minimum penalties (MMPs), which are required by the California Water Code as confirmed by SWRCB Order WQ 2007-0010. The revised NPDES permit in 2008 does not retroactively revise the requirements adopted in 1994.

The Limitations and the means of determining compliance with Order No. 94-295 is not ambiguous and clearly mandates that the approximately 240 “exempted” EC violations are subject to MMPs. The proposed ACLC must be amended accordingly.

Thank you for considering these comments. If you have questions or require clarification, please don’t hesitate to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Jennings". The signature is fluid and cursive, with the first name "Bill" and last name "Jennings" clearly distinguishable.

Bill Jennings, Executive Director  
California Sportfishing Protection Alliance